UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL JOHN KUNKEL, Defendant.	No. CR04-4040-DEO **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

On July 9, 2004, the defendant Michael John Kunkel ("Kunkel") filed a motion to suppress evidence in this case. (Doc. No. 28) The court scheduled a hearing on the motion for Friday, July 16, 2004. On July 14, 2004, the plaintiff (the "Government") filed a resistance to the motion. (Doc. No. 29) The court has reviewed the parties' briefs and a copy of the application for search warrant, and finds the matter can be decided without a hearing. Accordingly, **the hearing previously scheduled for July 16, 2004, is cancelled**.

I. BACKGROUND FACTS

On April 22, 2004, the grand jury indicted Kunkel on one count of conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Kunkel was arraigned on May 5, 2004, and the court scheduled trial for May 6, 2004. The trial scheduling order established a deadline for filing pretrial motions of four weeks from the date of arraignment, which would have been June 2, 2004. On June 15, 2004,

on the motion of Kunkel's codefendant, the trial was continued to August 2, 2004. On June 25, 2004, Kunkel filed a two-page motion to suppress evidence with no supporting brief, without offering any justification for the untimely filing, and without leave of court to file the motion out of time. The court struck the motion as untimely, and also noted the motion failed to contain sufficient facts for the court even to determine whether a hearing was warranted. In the interests of judicial economy, in light of the August 2, 2004, trial date, the court allowed Kunkel to refile a proper motion to suppress and supporting brief by July 9, 2004, and the court scheduled a hearing for July 16, 2004. Kunkel refiled his motion, which is now before the court.

Kunkel's motion still fails to set forth the underlying facts in sufficient detail for the court to determine the basis for his motion. His brief merely sets forth the standard of review when the court considers a motion to suppress evidence obtained during execution of a search warrant, and then restates the vague, conclusory statements in the motion.

The Government's resistance is more helpful to the court in determining the underlying facts. From Kunkel's motion, the Government's resistance, and the search warrant documentation attached as an exhibit to the Government's resistance, including the sworn affidavit of Plymouth County Chief Sheriff's Deputy Craig A. Bartolozzi in support of the search warrant application, the court finds the following facts that provide the background for Kunkel's motion.

On October 30, 2003, Deputy Bartolozzi was informed by Officer Shane Coyle of the Akron Police Department that Kunkel was located at 17511 K-18 in Plymouth County. There was an active warrant for Kunkel's arrest for possession of methamphetamine. Deputy Bartolozzi went to the location along Plymouth County Sheriff's Deputy Paul Betsworth and Officer Coyle. A Winnebago motor home was parked at the address. As the officers approached the motor home, Deputy Bartolozzi saw Kunkel through the

window. Deputy Betsworth knocked on the door of the motor home, ordered Kunkel to come out, and advised him that the officers had a warrant for his arrest.

While this took place, Deputy Bartolozzi was standing next to an open window of the motor home, and he smelled a strong odor of anhydrous ammonia. He also noticed a fan was sitting in the window, blowing outward. From his training and experience, Deputy Bartolozzi knew anhydrous ammonia is one of the ingredients used in the manufacture of methamphetamine. In addition, the deputy noticed a strong smell of anhydrous ammonia on Kunkel's person.

Deputy Bartolozzi began to enter the motor home to do a sweep for other individuals who might be inside. From the open doorway into the motor home, Deputy Bartolozzi could see a bowl containing a white, powdery substance. The deputy also saw a clear, plastic container on the ground next to the door. The container had frost covering the bottom half. Deputy Bartolozzi asked Kunkel what was in the container, and Kunkel responded that it contained anhydrous ammonia.

Codefendant Jason Fiedler also was present at the motor home. He was questioned by officers and gave a statement that included the following facts: (a) that night, he and Kunkel had manufactured a quantity of methamphetamine; (b) he and Kunkel had manufactured methamphetamine on ten to twelve occasions during the prior two months; (c) he and Kunkel had obtained precursors for manufacturing methamphetamine, including stealing anhydrous ammonia in Igloo containers or propane tanks; and (d) he and Kunkel had manufactured methamphetamine in July 2003, at a location where deputies had discovered the remnants of a methamphetamine lab.

Based on the above facts, Deputy Bartolozzi sought and obtained a warrant to search Kunkel's motor home.[1] On October 31, 2003, Kunkel was charged with various controlled substance violations in Plymouth County. The Plymouth County charges later were dismissed in favor of the federal charges now pending against Kunkel.

In his motion, Kunkel claims no evidence was present at the motor home that would have given the officers probable cause to initiate a search of his property. He also alleges, "[I]f the government was relying on a search warrant, they did not advise the Defendant of the same and did not make such a claim during the criminal proceedings which were originally filed in the Iowa District Court in and for Plymouth County." He argues "[t]hat, as a result, the United States obtained improper or illegal evidence, the use of which should be suppressed and/or excluded." (Kunkel's motion, p. 2)

In his brief, Kunkel elaborates briefly on the grounds for his motion, as follows:

> It is the position of the Defendant that the government did not have a valid search warrant and that the government attempted to use an older outstanding warrant to justify an arranged arrest of the Defendant at the location of his arrest in order to use that as a pretext for a search of the motor home.

(Kunkel's brief, unnumbered p. 2) Further, he argues that because the arrest warrant was, in his view, stale, the delay in his arrest pursuant to the warrant "render[s] stale the probable cause finding." (*Id.*, unnumbered p. 3) In support of this contention, Kunkel cites *United States v. Maxim*, 55 F.3d 394, 397 (8th 1995), and *United States v. Rugh*, 968 F.2d 750, 754 (8th Cir. 1992).

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[1]The court assumes additional incriminating evidence was discovered in the motor home when the search warrant was executed. However, neither party has so stated, and the return on the warrant, which would indicate when it was executed and what was found, is not included in the documents attached to the Government's resistance.

II. DISCUSSION

A. Entitlement to Evidentiary Hearing

The Eighth Circuit has adopted the following standard in determining whether a defendant is entitled to a hearing on a motion to suppress evidence:

> The applicable criterion, then, is that stated by the Ninth Circuit in *United States v. Ledesma*, 499 F.2d 36, 39 (9th Cir.), *cert. denied*, 419 U.S. 1024, 95 S. Ct. 501, 42 L. Ed. 2d 298 (1974), with which we agree.
>
> > Evidentiary hearings need not be set as a matter of course, but if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question, an evidentiary hearing is required.
>
> [Additional citations omitted.] It is also clear that a hearing is unnecessary when it can be determined without a hearing that suppression is improper as a matter of law. [Citations omitted.]

United States v. Losing, 539 F.2d 1174, 1177-78 (8th Cir. 1976); *accord United States v. Mims*, 812 F.2d 1068, 1073-74 (8th Cir. 1987).

Kunkel's moving papers lack the specificity, detail, and supporting facts and law to warrant an evidentiary hearing. Further, a hearing is unnecessary because it is clear suppression is improper as a matter of law.

B. Validity of Search

Kunkel is confused about the law applicable to these circumstances, and his reliance on *Maxim* and *Rugh* is misplaced. Those cases address the impact of dated information

used to support an application for a search warrant, or delay in executing a search warrant. Neither case addresses the validity of an allegedly "stale" arrest warrant.

A "long delay arising from the negligence or laziness of the arresting officers in executing an arrest warrant would be unreasonable," leading to a possible violation of a defendant's right to speedy trial. *United States v. Washington*, 504 F.2d 346, 348 (8th Cir. 1974); *see also State v. Olson*, 528 N.W.2d 651, 653 (Iowa Ct. App. 1995) (presumption of prejudice to defendant arises when state fails to execute arrest warrant timely without good cause). Kunkel has not raised a claim that the Plymouth County officers delayed unreasonably in arresting him on the outstanding warrant. Further, he has provided the court with no evidence regarding when the arrest warrant was issued, nor has he alleged the officers knew or easily could have ascertained his whereabouts for purposes of executing the arrest warrant.

The court finds the incriminating evidence located at the time of Kunkel's arrest either was within the officers' plain view, or was discovered in a search incident to his arrest on a valid outstanding warrant. A "protective sweep" of premises incident to a lawful arrest is entirely proper under the circumstances presented here. The United States Supreme Court explained in *Maryland v. Buie*, 494 U.S. 325, 327-28, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990):

> A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. . . . We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing," *Michigan v. Long*, 463

> U.S. 1032, 1049-1050, 103 S. Ct. 3469, 3480-3481, 77 L. Ed. 2d 1201 (1983) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968)), that the area swept harbored an individual posing a danger to the officer or others.

Id., 494 U.S. at 327-28, 110 S. Ct. at 1094-95. Such a protective sweep "is nevertheless not a full search of the premises, but . . . lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.*, 494 U.S. at 335, 110 S. Ct. at 1099.

In the present case, Deputy Bartolozzi stepped inside the motor home to see if anyone else was present. From the location of the front door, he could see a bowl of white powder. He stepped back outside and saw the plastic container with frost on the lower portion. He asked Kunkel what was in the container, and Kunkel stated it contained anhydrous ammonia. The Deputy's quick visual examination of the premises was appropriately brief, lasting no longer than was necessary to determine whether other individuals were in the motor home. All of the evidence upon which Deputy Bartolozzi based his search warrant application was within the officers' plain view at the site of Kunkel's arrest.[2]

[2]Moreover, the officers likely had probable cause to arrest Kunkel and conduct a protective sweep of the motor home based on the strong odor of anhydrous ammonia emanating from the motor home, and the fan blowing outward from the vehicle. Probable cause was further strengthened by the fact that the suspicious container outside the door was subject to inevitable discovery had the officers looked in that direction. *See United States v. Hessman*, 369 F.3d 1016, 1023 (8th Cir. 2004) ("[T]he odor of ether, when coupled with other facts, can establish probable cause.") (citing *United States v. Ryan*, 293 F.3d 1069, 1062 (8th Cir. 2002)).

III. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, that the defendants' motions to suppress be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections by **July 20, 2004**. Any response to the objections must be served and filed by **July 23, 2004**. **The parties are cautioned that these expedited deadlines will not be extended**, to allow the court sufficient time to rule on objections prior to the scheduled trial date of August 2, 2004.

IT IS SO ORDERED.

DATED this 14th day of July, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT